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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Written statement* submitted by Human Rights Advocates Inc., a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[17 February 2014]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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Promoting Cultural Rights through heritage laws

I. Introduction

The resolution establishing the mandate provides that the Special Rapporteur will examine “means to sensitize institutions and society on diverse cultural heritage.”¹ One way to achieve this goal is to ensure countries with diverse groups have robust cultural heritage laws protecting against the illicit trade and acquisition of cultural patrimony. Cultural heritage laws govern claims asserted by past owners and creators of cultural objects against the current possessor.² As argued below States need a strong legal framework to uphold the diversity of a nation’s culture so certain groups’ culture does not fall prey to illicit acquisitions.

II. International Human Rights Standards

The right to enjoy one’s culture and celebrate its diversity is an international human right that covers participation and enjoyment of culture.³ Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) mirrors the cultural rights enshrined in the Universal Declaration of Human Rights and adds that State parties have the responsibility “for the conservation, the development and the diffusion of science and culture.”

Unfortunately, global recognition of this human right is not enough to curb the illicit trading of cultural heritage and its destruction to communities caused by uprooting cultural patrimony. The trade of cultural patrimony on the black market is the third most profitable entity just behind the selling of guns and drugs.⁴ In response, the United Nations Educational, Scientific and Cultural Organization (UNESCO) promulgated regulations addressing the illicit trade of cultural heritage.⁵ To realize the efforts of UNESCO and international guidelines espoused in the treaties, governments must ensure their own domestic laws advance ways to protect the diversity of culture within and outside their borders.

III. Country Examples

The United States (US) and Australia portray domestic resolutions to recognizing the protection of cultural diversity. Indigenous communities’ cultures are at risk of illicit trading in both countries. Alternatively, Kenya depicts a scenario of how to protect cultural heritage without a national law.

United States

The US has two laws that primarily govern protecting American Indian cultural heritage: the Native American Grave Protection and Repatriation Act (NAGPRA) and the National Museum of the American Indian Act (NMAI). Under NAGPRA, anyone who “knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains” can be prosecuted.⁶ This liability also extends to cultural items.⁷

¹ “Promotion of the enjoyment of the cultural rights of everyone and respect for cultural diversity,” A/HRC/RES/23/10 (June 20, 2013).

² Dr. Derek Fincham, *Justice and the Cultural Heritage Movement: Using Environmental Justice to Appraise Art and Antiquities Disputes*, 20 Va. J. Soc. Pol’y & L. 43, 44 (2012).

³ Universal Declaration of Human Rights Art. 27(1).

⁴ Aaron Kyle Briggs, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 Chi. J. Intl. L. 623, 625 (2007).

⁵ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention), 823 U.N.T.S. 231, Art. 1.

⁶ 18 U.S.C.A. § 1170(a).

⁷ *Id.* at § 1170(b).

The NMAI only governs the collections of Native American artifacts and cultural heritage owned and managed by the federal government and its institutions. This act also created a repatriation department within the Museum of the American Indian to establish relationships with federally recognized tribes to pursue returning cultural heritage.⁸ Once human remains, sacred, cultural or funerary objects' cultural affiliation is established with a federally recognized nation, then the Federal institution must immediately act to return the objects or remains.⁹ It is also important to note the NMAI encourages Federal agencies and museums to share information with American Indian tribes.¹⁰

The two statutes are meant to restore the broken links created by colonization practices and also celebrate the diversity of American heritage. By returning lost culture to its original owners and caretakers, communities can assert their right to maintain, exhibit, and control their cultural patrimony according to their customs. This reinforces the Special Rapporteur's mandate to sensitize institutions to diverse cultures by encouraging dialogue to resolve contentious issues of resolving ownership of history and culture. However, it is important to highlight only federally recognized tribes are able to benefit from these laws.¹¹

US laws narrowly construe who may benefit while the international community has a broader conception for indigenous rights.¹² This has led the US to assess whether to endorse the United Nations Declaration of the Right of Indigenous Peoples by consulting Native American Nations.¹³ Recognizing a broader conception would mean the US could be more assertive in reclaiming cultural objects that leave US jurisdiction.

Australia

The most recent policy statement from the Australian government cites the importance of its rich diverse cultural heritage, and particularly identifies Aboriginal and Torres Strait Islander culture as part of Australian identity.¹⁴ To protect and further enhance the rich and diverse cultures of Australia, the government passed two important pieces of legislation, the Moveable Cultural Property Act (MCPA)¹⁵ and the Aboriginal and Torres Strait Islander Cultural Heritage Protection Act (Cultural Heritage Act).¹⁶ Under the MCPA, the government created a National Heritage Control List that divides cultural heritage into two classes (A or B).¹⁷ Class A lists objects that may not be exported. There are specific references to Aboriginal and Torres Strait Islander's heritage such as, "sacred and secret ritual objects, bark and log coffins used as traditional burial objects, human remains, rock art, and dendroglyphs (carved trees)."¹⁸ Class B stipulates these items must have permission to be exported. While Class B contains some Aboriginal culture, the government ensures there must be properly certified permits before any item leaves.

The Cultural Heritage Act grants Aborigines the ability to request the Minister for the Arts to declare certain objects under special protection. The petitioner must meet two criteria: first, establish the significance of the object and second, demonstrate a "threat of injury or desecration."¹⁹ This ability to petition the government to extend its protection of cultural heritage objects strengthens the government's efforts to curb illicit trafficking and promote the culture of Aboriginal and Torres Strait Islanders.

Australia also has a national domestic repatriation program that is part of the Ministry for the Arts. As the main entity for protecting cultural heritage, this agency handles domestic and foreign affairs regarding Indigenous cultural

⁸ <http://nmai.si.edu/explore/collections/repatriation/>.

⁹ 25 U.S.C.A. § 3005.

¹⁰ *Id.* at § 3005(d).

¹¹ Goldberg, Carole E. A United States Perspective. *International Trade in Indigenous Cultural Heritage*. Edward Elgar Publishing Limited, p. 336, 2012.

¹² *Id.* at 340.

¹³ *Id.*

¹⁴ http://arts.gov.au/sites/default/files/indigenous/repatriation/Repatriation%20Policy_10%20Oct%202013.pdf

¹⁵ Act No. 11 of 1986, C2011C00238. http://www.comlaw.gov.au/Details/C2011C00238/Html/Text#_Toc290360542.

¹⁶ Act No. 79 of 1984, C2010C00807. http://www.comlaw.gov.au/Details/C2010C00807/Html/Text#_Toc280161578

¹⁷ *Supra* note 15.

¹⁸ <http://arts.gov.au/movable/export/list>.

¹⁹ *Supra* note 16, at 12, 1(b)(ii).

patrimony. Like the institutions in the US, the Indigenous repatriation program seeks to reconcile past offenses by restoring stolen artifacts, remains and cultural objects to the communities.²⁰

Kenya

Kenya provides an example of how to protect cultural heritage in absence of a legal framework. Sacred burial markers found on Kenya's coast, known as vigango, have been targeted by "some unscrupulous art dealers."²¹ Vigango (plural for Kigango), of the Mijikenda communities, are created from wood to honor departed ancestors. Each one has its own "motif" and the more elaborate the Kigango, the more important the individual.²² Since the Mijikenda believe a Kigango embodies the ancestor's spirit, removing it harms the community.²³

The coastal communities have struggled to reclaim to the Vigango because there is a "lack of direct legal prohibition of their taking. The objects are stolen from villages in Kenya, yet the objects are not old enough to be classified as antiquities."²⁴ Without a legal framework, these communities rely on social justice pleas to restore the broken link between ancestors and their descendants.

Some museums have responded to these social justice initiatives. For example, the Denver Museum of Nature and Science just returned 30 Vigango it received as donations in the 1990s that were believed to have been stolen.²⁵ The museum's curator of anthropology, Chip Colwell-Chanthaphonh, asserted the absence of a legal claim does not negate a museum's ethical duty to return cultural objects.²⁶

IV. Recommendations

Human Rights Advocates urges:

- Governments to assess their legal framework to protect groups at risk of cultural exploitation by encouraging their public and private museums to reach out to indigenous communities to better understand the impact of restoring stolen culture.
- The Human Rights Council to request the Special Rapporteur to investigate how to protect the portrayal of history by assessing ways museums uphold ethical obligations to protect diverse cultures when legal remedies are absent.

²⁰ <http://arts.gov.au/indigenous/repatriation>.

²¹ Dr. Derek Fincham, *Justice and the Cultural Heritage Movement: Using Environmental Justice to Appraise Art and Antiquities Disputes*, 20 Va. J. Soc. Pol'y & L. 43, 93 (2012).

²² Fincham quoting George O. Abungu, "Universal Museums": New Contestations, New Controversies, in *Utimut: Past Heritage--Future Partnerships, Discussions on Repatriation in the 21st Century* 32, 38 (Mille Gabriel & Jens Dahl eds.), 2008.

²³ *Supra* note 21, at p. 93.

²⁴ *Id.*

²⁵ <http://www.nytimes.com/2014/01/04/arts/design/denver-museum-to-return-totems-to-kenyan-museum.html>

²⁶ *Id.*